IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 15, 2005 Session

JIMMY D. JONES, JR. v. PATRICIA ANN (ELIAS) JONES

Appeal from the Circuit Court for Montgomery County
No. 50200811 Ross H. Hicks, Judge

No. M2004-02687-COA-R3-CV - Filed March 8, 2006

In this divorce case, the issue presented is whether the trial court erred in awarding the wife periodic alimony in the amount of $2,000 per month for three years and "arrearages of temporary back support" in the amount of $9,318. We affirm the judgment of the trial court as to the amount of monthly alimony awarded; however, we modify the award to designate it as rehabilitative alimony rather than periodic alimony. We further hold that there can be no arrearage of temporary spousal support when there was no order prior to the final divorce hearing awarding the wife temporary support. However, we hold that the award to wife of $9,318 in alimony is appropriate, but should be modified to properly classify it as alimony *in solido.*

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the Appellant, Jimmy D. Jones, Jr.

Ted A. Crozier, Jr. and Julia P. North, Clarksville, Tennessee, for the Appellee, Patricia Ann (Elias) Jones.

OPINION

I. Background

Jimmy D. Jones, Jr. and Patricia Ann Elias Jones[1] were married on February 2, 1991. Marital difficulties arose and on November 8, 2002, Mr. Jones filed his complaint for divorce. Ms. Elias answered and filed a counter-claim in which she requested, among other things, temporary support

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[1]The trial court's divorce decree restored the wife to her maiden name of Patricia Ann Elias, and we will refer to her as "Ms. Elias" in this opinion.

and an immediate support hearing. On February 26, 2004, Ms. Elias filed a motion for temporary support in which she requested the trial court award her $1,500 per month in temporary support. Ms. Elias alleged in her motion that Mr. Jones had made regular payments to her in the amount of $1,200 per month until December of 2003, but that he lowered the payment to her in December of 2003 and January of 2004 to $741, and made no support payment in February of 2004.

The trial court heard the motion on March 9, 2004, and deferred ruling on it until the trial date, which was apparently set for March 30, 2004. Although there is no order of continuance in the record, it appears that the trial date was continued, because Ms. Elias filed a motion to continue on April 28, 2004, in which she alleged that Mr. Jones had not complied with her discovery requests made at his deposition for certain financial and employment information. In her motion to continue, Ms. Elias again requested that the trial court set temporary support for her. The case was heard on May 14, 2004. After the trial, the trial court entered a divorce decree granting Ms. Elias a divorce on grounds of inappropriate marital conduct. The trial court further ruled as follows:

> The Plaintiff [Mr. Jones] had not provided full disclosure of documents on April 30, 2004 when the final hearing was held, therefore the Court withheld its final ruling until these documents were provided.
>
> Mr. Jones is to provide documentation that he will or will not receive severance or disability pay from the military and/or sign a required privacy act release so that the Defendant's attorney may receive this information from the military.
>
> * * *
>
> The Court withholds ruling on spousal support to be paid until a later date when discovery is fully complied with.

On October 4, 2004, the trial court entered an order finding Ms. Elias in need of financial support, and that Mr. Jones "has the ability to pay the financial support owed. . .and is a highly skilled individual." The trial court awarded Ms. Elias periodic alimony in the amount of $2,000 per month for three years, and ruled that Mr. Jones "is to pay the Defendant. . .$9,318 in arrearages of temporary back support within one year from the date of September 1, 2004."

II. Issues Presented

Mr. Jones appeals, presenting the following issues, as paraphrased from his brief:

1. Whether the trial court erred in awarding Ms. Elias temporary spousal support arrearages when no order for temporary spousal support existed.

2. Whether the trial court erred in awarding Ms. Elias periodic alimony.

III. Standard of Review

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations which we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville,* 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett,* 860 S.W.2d 857, 859 (Tenn. 1993).

Regarding an award of spousal support, this court has declared on numerous occasions that a trial court has broad discretion in determining the type, amount and duration of alimony, based upon the particular facts of each case. *Wood v. Wood,* No. M2003-00193-COA-R3-CV, 2004 WL 3008875 at *4, 2004 Tenn. App. LEXIS 877 at *12-13 (Tenn. Ct. App. M.S., filed Dec. 28, 2004) and cases cited therein; *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). As an appellate court, we are disinclined to second guess a trial court's alimony decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Nelson v. Nelson,* 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002).

IV. Spousal Support

We first address the trial court's award of alimony to Ms. Elias of $2,000 per month for three years. There are no hard and fast rules for spousal support decisions. *Manis v. Manis,* 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001); *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996).

In determining the nature, amount, length of term, and manner of payment of spousal support, the Supreme Court has recently provided the following guidance:

> A trial court must consider every relevant factor in Tennessee Code Annotated section 36-5-101(d)(1) (2001)[now T.C.A. §36-5-121(i)] to determine the nature and extent of support. The two most important factors considered are the need of the disadvantaged spouse and the obligor spouse's ability to pay. *See Burlew v. Burlew,* 40 S.W.3d 465, 470 (Tenn.2001).

Bratton v. Bratton, 136 S.W.3d 595, 604 (Tenn. 2004).

The statutory factors required to be considered by the trial court are set forth in T.C.A. § 36-5-121(i) as follows:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
>
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
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> (3) The duration of the marriage;
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> (4) The age and mental condition of each party;
>
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
>
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
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> (7) The separate assets of each party, both real and personal, tangible and intangible;
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> (8) The provisions made with regard to the marital property as defined in § 36-4-121;
>
> (9) The standard of living of the parties established during the marriage;
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> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
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> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

In the present case, the record before us does not contain a transcript of any of the proceedings below. The parties filed a joint statement of the evidence in lieu of a transcript.

Applying the above-cited factors to this case, we find that the record supports the amount of spousal support awarded by the trial court.

Regarding Ms. Elias' need for support, her sworn statement of income and expenses, filed with the trial court on April 30, 2004, establishes an income of $454 per month and expenses of $3,213.50 per month, a monthly deficit of $2,759.50. Nothing in the record or Mr. Jones' brief contradicts these figures. Ms. Elias testified that she was unemployed at the time of the hearing because she was taking care of her elderly parents, who live seven hours away from her in Colombia, South Carolina. We find that the evidence does not preponderate against the trial court's conclusion that Ms. Elias has shown a need for spousal support.

Regarding Mr. Jones' ability to pay, the statement of the evidence provides that he testified that "his salary is $1,812 every two weeks." The record contains a pay stub for Mr. Jones for the two-week period of February 29, 2004–March 13, 2004, which shows he received gross pay for that period in the amount of $2,849.68. Mr. Jones' brief states that "Mr. Jones makes $6,174 per month," citing the statement of the evidence he filed with the trial court below. During the course of this litigation, Mr. Jones ceased his active duty in the U.S. Army after some 13 years of service. The record reflects that Mr. Jones received a net severance pay allowance of $58,699.22 from the Army, and a monthly entitlement payment of $210.

The statement of the evidence states as follows regarding Mr. Jones' payments of spousal support prior to the divorce decree:

> Plaintiff [Mr. Jones] testified that he paid his wife $1,500.00 for the months of October, November and December 2002. Plaintiff further testified that he began paying his wife $1,200.00 a month in January 2003, but the $1,500.00 that he was paying was not an agreed amount that he would pay her on a monthly basis. Plaintiff testified that he reduced payments to his wife to $741.00 for December 2003 and January 2004, as that is what the U.S. Army paid him for housing allowance. Plaintiff testified that he has not paid his wife any support since January 2004.

Mr. Jones further testified that he recently purchased a new house and a new vehicle in 2002 and 2003. We find that the evidence does not preponderate against the conclusion that Mr. Jones has the ability to pay spousal support.

Regarding statutory factor (2), the relative education and training of each party, Ms. Elias is a registered nurse and a retired Lieutenant Colonel in the U.S. Army Reserves. Ms. Elias testified,

however, that "she is not physically fit to be a floor nurse and for her to find an adequate job in her field of nursing, that she would need a Master's degree so that she can teach or seek employment in a supervisory position." Ms. Elias planned to return to school for further training and to seek a master's degree in nursing. Mr. Jones is a helicopter pilot with mechanical skills and a high school diploma; the trial court found him "a highly skilled individual," and the evidence does not preponderate against this finding.

Regarding statutory factor (3), the parties had been married for eleven years when Mr. Jones filed for divorce.

Regarding factors (4) and (5), Ms. Elias is presently 57 years old. She testified that she has "numerous physical ailments" and spends roughly $432 per month on medical drugs. Mr. Jones is currently 39 years old. Mr. Jones stated that he separated from the Army "partially because of an ongoing medical condition," and that he received a medical discharge, but there is no evidence suggesting Mr. Jones' physical condition precludes his gainful employment in the record.

Statutory factors (6) and (7) are not pertinent to this case. Regarding factor (8), the parties reached an agreement regarding the division of the marital estate. It does not appear that the parties had a significant marital estate. They did not own any real property, and there was no marital debt. The trial court's final order states simply that each party "is awarded all property in his [or her] possession."

Regarding statutory factor (10), the relative tangible and intangible contributions to the marriage, the statement of the evidence provides the following synopsis of Ms. Elias' testimony:

> At the time of the marriage, she was [a] tenured Assistant Professor at Miami-Dade College, which she resigned to marry the Plaintiff and support his career. At the time of the marriage, she was working on her Master's Degree and studying for the M-CATS. She moved away from her home and friends to support the Plaintiff's military career. . . .She moved five times with the Plaintiff, because of military transfers.

In contrast, Mr. Jones testified that "[a] chief reason for the marital problems was [Ms. Elias'] gambling problems and her refusal to work. . . She did not work much during the marriage, but

continued to gamble when Plaintiff was deployed even after [her] 1994 revelation of huge gambling debts."[2]

Regarding factor (11), relative fault, Mr. Jones denied marital infidelity; however, Mr. Ernie Mills, a private investigator hired by Ms. Elias, testified that he had observed Mr. Jones' car parked outside of his alleged paramour's residence for overnight periods. Mr. Jones admitted that he had made 435 telephone calls to the other woman between August 2002 and January 2003. The trial court found inappropriate marital conduct by Mr. Jones and granted Ms. Elias the divorce.

Our analysis of the circumstances of this case under the relevant statutory factors persuades us that the evidence does not preponderate against the amount of the trial court's awards of spousal support. However, we believe the trial court did not correctly classify its spousal support awards.

There are several separate classes of spousal support in Tennessee, including long-term periodic spousal support (alimony *in futuro*), lump sum spousal support (alimony *in solido*), rehabilitative spousal support, and transitional spousal support. T.C.A. § 36-5-121 (formerly § 36-5-101). Tennessee law recognizes a statutory preference for rehabilitative spousal support. T.C.A. § 36-5-121(d); *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Crabtree v. Crabtree*, 16 S.W.3d 356, 358 (Tenn. 2000). This statutory preference does not entirely displace the other forms of spousal support when the facts of the case warrant long-term or more open-ended support. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Isbell v. Isbell*, 816 S.W.2d 735, 739 (Tenn.1991); *Troglen v. Troglen*, No. E2004-00912-COA-R3-CV, 2005 WL 990567 at *6 (Tenn. Ct. App. E.S, filed Apr. 28, 2005).

With respect to rehabilitative alimony,

> It is the intent of the general assembly that a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, whenever possible, by the granting of an order for payment of rehabilitative alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

T.C.A. §36-5-121(d)(2) (formerly § 36-5-101(d)(1)(c)).

[2]It appears that much of the gambling debt to which Mr. Jones refers was paid off by Ms. Elias' father. As noted, there was no marital debt at the time of the divorce.

As noted, the trial court designated its three-year award of $2,000 per month as periodic alimony, also known as alimony *in futuro*. T.C.A. § 36-5-121(f)(1). In *Waddey v. Waddey*, 6 S.W.3d 230 (Tenn. 1999), the Supreme Court discussed the characteristics of an award of alimony *in futuro*, stating that "[a]limony *in futuro,* however, lacks sum-certainty due to contingencies affecting the total amount of alimony to be paid." *Waddey*, 6 S.W.3d at 232. Under the *Waddey* Court's analysis, and under the statutory definition of alimony *in futuro* as "a payment of support and maintenance on a long term basis or until death or remarriage of the recipient," T.C.A. § 36-6-121(f)(1), the trial court's three-year award was clearly not properly classified as alimony *in futuro* or periodic alimony.

As to the issue of the proper classification of the alimony award under the circumstances of this case, the statement of the evidence contains the following significant assertions regarding Ms. Elias' plan for further training and education:

> [Ms. Elias] testified that she is not physically fit to be a floor nurse and for her to find an adequate job in her field of nursing, that she would need a Master's degree so that she can teach or seek employment in a supervisory position. . . [She] planned on getting a Master's Degree in Nursing as supervisor instead of as a floor nurse.

Ms. Elias apparently also testified as to the anticipated cost of getting her master's degree.

In light of the clear statutory preference in Tennessee for rehabilitative alimony, and because the record contains evidence of a plan for rehabilitating Ms. Elias through further education, we hold that the trial court's three-year award of $2,000 per month is properly classified as rehabilitative alimony.

We now address the trial court's award of $9,318 to Ms. Elias, classified by the trial court as "arrearages of temporary back support." A party cannot be "in arrears" of payments of temporary alimony (also known as alimony *pendente lite*) when no order awarding temporary alimony has been entered. However, considering the applicable statutory factors as discussed and analyzed above, we are of the opinion that the evidence supports the amount of the award, and that the award is correctly classified as lump sum spousal support, also known as alimony *in solido*.

T.C.A. § 36-5-121(d)(1) authorizes a trial court to award "a combination of" the various types of spousal support, according to the nature of the case and circumstances of the parties. Further, T.C.A. § 36-5-121(d)(5) provides that "[a]limony in solido may be awarded in lieu of or in addition to any other alimony award. . .where appropriate." Under the particular facts of this case, we are persuaded that it is such a case where an award of both alimony *in solido* and rehabilitative alimony is appropriate.

V. Conclusion

The judgment of the trial court awarding Ms. Elias $2,000 per month in spousal support for three years is affirmed, and upon remand the trial court shall enter an order clarifying that this award is classified as rehabilitative alimony. The judgment of the trial court awarding Ms. Elias $9,318

in spousal support is also affirmed, and upon remand the trial court shall clarify in its order that this award is alimony *in solido*. The award of alimony *in solido*, including statutory interest, is to be paid within one year of the date of the trial court's entry of final judgment upon remand. The case is remanded for such further action as may be necessary, consistent with this opinion. Costs on appeal are assessed to the Appellant, Jimmy D. Jones, Jr.

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SHARON G. LEE, JUDGE